In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1649

DOUGLAS JOHN EYRAUD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that it was reversible error for the government to ask petitioner, allegedly in bad faith, about prior convictions and for the trial court to fail, *sua sponte*, to instruct the jury to disregard the question. Petitioner also contends that the court reporter's failure to report in full certain colloquies at the bench was a denial of due process.

After a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to seven years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence showed that at 5:50 p.m. on November 5, 1968, petitioner and Jack Eskew robbed the Community National Bank of Pumpkin Center, California. Eskew entered the bank, armed and alone, while petitioner acted as a lookout. After obtaining approximately forty-six thousand dollars, Eskew fled the bank and climbed into the trunk of a waiting car driven by petitioner (Tr. 26-30, 33, 79).

At trial, petitioner was asked on cross-examination whether he had ever previously been convicted of a felony. Petitioner replied that he had not. Defense counsel then requested permission to approach the bench. The noon recess was taken at that time (Tr. 273-274).

Out of the presence of the jury, the prosecutor stated that he had been informed by the District Attorney's Office in Santa Ana, California that, six weeks before the instant trial, petitioner had pleaded guilty to a charge of first degree robbery in the Orange County Superior Court. The prosecutor further stated that he had requested a certified copy of the conviction (Tr. 275). After argument as to whether a plea of guilty, in advance of sentencing, constitutes a conviction for impeachment purposes, the court ordered that the subject not be pursued in the presence of the jury (Tr. 276-286).

1. Petitioner contends that it was reversible error for the government to ask petitioner, allegedly in "bad faith," whether he had ever previously been convicted of a felony and for the trial court to fail to instruct the jury to disregard the question.

Contrary to petitioner's claim, and as the court of appeals noted, "the question was asked in good faith, for the prosecutor had been reliably informed that the appellant recently had pleaded guilty in the Orange

County Superior Court to the offense of armed robbery" (Pet. App. A-1). Moreover, the government had requested a certified copy of the conviction and had only recently been advised that no copy had as yet arrived (Tr. 275).

Defense counsel did not request that the trial court admonish the jury to disregard the question in issue. Counsel may well have concluded that in light of petitioner's firm denial of ever having previously been convicted of a felony, a judicial admonishment would tend only to stress the issue to petitioner's disadvantage. The trial concluded without any further reference to a criminal record. There is thus no evidence or reason to believe that petitioner was prejudiced by this episode.

2. Petitioner's contention that the failure to report in full the colloquies at the bench constituted a denial of due process is frivolous. No motion to augment the record was made and petitioner has made no showing of prejudice with regard to this claim.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.

DOJ-1974-07